90-1375

Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM 1990

JOSEPH KASPAROFF,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the admission at trial of a non-testifying co-defendant's admissions which directly incriminate the defendant, but which do not contain the defendant's actual name, instead containing the name of defendant's business of which he is sole owner and president, violate the defendant's right to Confrontation guaranteed by the Sixth Amendment to the United States Constitution, despite the limiting principles set forth in *Richardson v. Marsh*, 481 U.S. 200 (1987).

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than petitioner. At trial, there were three defendants, Joseph Kasparoff (petitioner), John Kasparoff and Harold Geyer. Petitioner and John Kasparoff filed separate appeals in the United States Court of Appeals for the Ninth Circuit. Their cases were subsequently consolidated in that court.

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REFERENCE TO OFFICIAL REPORTS

The opinion of the Court of Appeals filed on November 30, 1990, was not published. A copy of that opinion is attached to this opinion as Exhibit A. *United States v. Kasparoff*, United States Court of Appeals for the Ninth Circuit, No. 89-50342.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 30 1990. Jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Amendment VI, Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE

On November 17, 1988, petitioner was named as a defendant in a five count indictment filed in the United States District Court for the Central District of California. Also named as defendants were John Kasparoff, Harold Geyer and John Turner. Prior to trial, John Turner entered a plea of guilty.

Petitioner was charged in Count I with violating Title 18, United States Code, Section 371 (conspiracy to commit an offense against the United States or to defraud the United States) and Title 18, United States Code, Section 286 (conspiracy to defraud the United States with respect to false, fictitious or fraudulent claims). In Counts II and IV, Petitioner was charged with violating Title 18, United States Code, Sections 2(b) and 1001 (causing a false statement to be made on a matter within federal jurisdiction). Counts III and V charged Petitioner with violating Title 18, United States Code, Section 287 (making a false claim to the United States government).

On December 19, 1988, petitioner filed a motion to sever his trial from that of the other named defendants, and specifically defendant Harold Geyer. The argument for severance was based on statements that Geyer had made to law enforcement agents which incriminated petitioner and which the government sought to admit at trial through the testimony of a government law enforcement agent. The motion contended that under *Bruton v. United*

States, 391 U.S. 123 (1968) and its progeny, Geyer's statements were inadmissible against petitioner and could not be introduced in a joint trial.

On January 9, 1989, the trial court denied the severance motion, but ordered the government to redact the statements purportedly made by Geyer. However, the redacted version, as noted below, failed to eliminate numerous incriminating references to the petitioner.

The charges in this case arose from alleged false billings submitted by Super K, a defense sub-contractor, to the United States Air Force for work done on the B-1 bomber. Petitioner was the owner and operator of Super K, a sole proprietorship which acted as a defense sub-contractor to Rockwell International for production of the B-1 bomber.

The United States Air Force had contracted with Rockwell for the production of the aircraft, and Rockwell had subcontracted with Super K in July 1982 for production of the bulkheads which were used on each B-1 bomber. John Kasparoff, petitioner's nephew, was Super K's general manager, and Harold Geyer was a subcontractor and employee of the company.

The charges stemmed from Super K's claims to Rockwell for additional payments for alleged out-of-scope efforts performed by Super K on production of the bulkhead for "ship sets two and three." The government contended that Super K falsely stated that one employee worked on the bulkhead project, when in fact the employee was not employed by Super K at the time. The government put on evidence in an attempt to show that Super K falsely stated that certain employees worked on the bulkhead project for a given number of hours, when

the employees either did not work on the project at all or, if they did, worked less hours than stated.

The government also contended that Super K made false statements to the effect that certain work was performed by outside vendors at Super K when the work was either not performed at all or was not performed on site at Super K.

The defense theory was that a number of the employees performed work that they did not initially associate with the bulkhead, but that could have actually been attributed to the bulkhead project. The defense further contended that a number of employees were placed on stand-by, waiting time, and "dedicated time" when they were told to make themselves available on a moment's notice to work on the bulkhead. Super K needed to have workers constantly on-call because of Rockwell's time demands which arose out of their delays in supplying Super K with the raw materials for Super K to machine and the fact that the bulkhead was a "destiny critical" part in the ultimate production of the B-1 Bomber.

Both on cross-examination and in the petitioner's case-in-chief, the defense stressed the almost super-human effort put forth on the part of Super K, a relatively small machine shop in the world of the Southern California defense industry. Super K ran seven days a week, 24 hours per day, and many employees worked staggering numbers of hours to ensure the timely production of the Bulkhead.

A substantial portion of the government's case-in-chief consisted of the testimony of three government agents; Robert Sterling, Ronald Mayeda and Robert Young. Robert Sterling, an investigator for the Criminal Investigation Division of the Internal Revenue Service, testified

that on July 22, 1987, he and special agent Carlos Torres interviewed co-defendant Harold Geyer for approximately 20 minutes. According to agent Sterling, Geyer indicated that he had worked at Super K on and off for a period of years and that for the past three or four years he had received approximately $50,000.00 per year. He said the only reason he received checks from Super K was for work he had done for them.

Agent Sterling testified that Geyer then stated that he had gotten "the least of anyone in this whole situation." Agent Sterling further testified that Geyer stated, "I didn't just fall off a turnip truck. I knew what I was doing and that it was wrong." At that point in the interview, Geyer told agent Sterling that he felt he should contact an attorney and the interview was terminated.

A second interview took place on August 19, 1987. Agent Sterling testified that Geyer stated that he had done work for Super K in exchange for checks. Geyer stated that he did not actually perform the work on Super K property. He said that much of the work that was given to him by Super K he, in turn, subcontracted out to other shops and then coordinated the work that he had subcontracted out. He indicated that all payments he made to subcontractors were in the form of cash. He said the reason for cash payments was to avoid the Internal Revenue Service. Geyer also said that he had compiled records over the last four years, but had thrown them away after awhile.

Agent Sterling also testified that he told Geyer that he believed that Super K had paid Geyer $600,000 in the years in question. According to agent Sterling, Geyer said something to the effect of, "Oh, was it that much?" On cross-examination, agent Sterling testified that Geyer

told him that he paid a great deal of the money out to other people and did not retain the $600,000 as income.

Sterling also testified that he twice interviewed petitioner. Concurrent with the interview, agent Sterling subpoenaed books and records of Super K and JK Precision, a second company owned by petitioner. Sterling testified that at the December 7, 1987 interview, petitioner indicated that all payments to vendors and on site contractors were made by check. Agent Sterling further testified that petitioner stated that Geyer would occasionally do work on the premises at Super K.

Agent Sterling also testified about an interview with Petitioner on April 15, 1988, at which John Kasparoff was also present. At that interview, petitioner again indicated that all payments to vendors and employees were made by check.

The government also called Ronald R. Mayeda, an agent with the Defense Criminal Investigation Service (DCIS). Mayeda testified that he was involved in the investigation of Joseph and John Kasparoff, and Harold Geyer. He testified that he accompanied agent Bob Young, the principal investigator, on a number of interviews and that he interviewed Harold Geyer on two occasions.

Agent Mayeda testified that he told Geyer that he and agent Young were investigating a subcontract between Super K and Rockwell, specifically a contract for the bulkhead, and were attempting to verify invoice claims that were presented to Rockwell in support of the subcontract. According to Agent Mayeda, Geyer stated that his role was primarily as an expediter rather than a machinist, and that the subcontracts he got from Super K would be brokered out to other machinists. He said he would then prepare an invoice on work relating to the contracts and submit it to Super K.

Agent Mayeda further testified that Geyer stated he had no records for the time period that they were concerned with because he destroys his records 30 to 90 days after he has been paid. According to agent Mayeda, Geyer stated that he was involved with subcontracting a "vacuum chuck" out to Welch Industries and that he could not recall to which contractor he had sent "profile mill cams." Mayeda noted that Geyer did not appear at all familiar with key terminology basic to machining business.

Mayeda also testified that Geyer stated that none of his work was done at Super K. Agent Mayeda testified that he told Geyer that he had obtained checks paid to Geyer from Super K and from JK Precision, and that the checks indicated that he had been paid a total of $1,260,000 from JK Precision and Super K. Agent Mayeda also stated that he told Geyer that a $48,500 invoice submitted to Rockwell indicated that the work was done on site at Super K and that this allowed Super K to then claim overhead costs of approximately $220,000. Agent Mayeda then testified that Geyer stated he was unaware that Super K had claimed any overhead.

Agent Mayeda then told Geyer that Super K employees had informed the agents that the work Geyer had claimed to have done was actually done by Super K employees at Super K and that Geyer was not involved with the work. Agent Mayeda also told Geyer that no paper work at Super K or anywhere else was found to support the records. According to agent Mayeda, Geyer responded, "What can I say." Agent Mayeda then testified that he told Geyer that he might possibly be implicated in a conspiracy to defraud the government. According to agent Mayeda, Geyer stated that he wanted to tell the truth but did not want to be the only one who told the truth. Geyer asked if other people were going to cooper-

ate, and stated that he knew what he did was wrong but that he needed the money.

At a second interview on May 3, 1988, at which time Geyer was present with his attorney, Geyer stated that Welch Industries was the major subcontractor for the bulkhead work. However, according to Geyer, Welch Industries was now defunct and both owners deceased. At this time, agent Mayeda also testified that Geyer stated that he did not perform work on site and Super K.

Agent Mayeda also testified that he participated in two interviews with Joseph and John Kasparoff; one on January 29, 1988, and one on March 23, 1988. He stated that at the meeting of March 23, 1988, Mr. Kasparoff (unspecified as to which one) stated that no provisions for standby were made and they were not charging for employees standing by when the part was not at the shop. Agent Mayeda also testified that during the first meeting with Joseph and John Kasparoff, John Kasparoff stated that Wilkenson did most of the NC programming on the bulkheads. Agent Mayeda also testified that John Kasparoff stated that some programming was done outside of Super K by Future Machine Company and by Alan or Mack Manes. Agent Mayeda stated that John Kasparoff told him that Harold Geyer had performed work on a vacuum and various other toolings for the bulkhead. John Kasparoff also stated that Geyer performed work on datum C tooling. John said it was done both on and off the Super K site.

Agent Mayeda further testified that John Kasparoff told him that Harold Geyer had performed work on a vacuum and various other toolings for the bulkhead. John Kasparoff also stated that Geyer performed work on datum C tooling. John said it was done both on and off the Super K site.

Agent Mayeda stated that he was told that Harold Geyer prepared many of the shop aids for the bulkhead project and that John Kasparoff told Mayeda that Geyer obtained some of the tooling from outside sources but that he built some of the shop aids on the machines in the plant, "in house." Mayeda was not told where "in house" Geyer had performed the work; however, he later learned that petitioner had two machine shops close together, Super K and JK Precision.

On redirect examination, agent Mayeda testified that Geyer asked him if other people were cooperating with the investigation. Agent Mayeda also stated that Geyer told him he knew he had done something wrong and that he wanted to tell the truth and wanted to know what consideration would be given to him in return for his cooperation. Geyer stated that he knew things were "not right at Super K."

The government also called agent Robert Young as a witness. Agent Young works for DCIS and has been employed by them since November 1977. Young was the chief agent in the Kasparoff case. Young testified that he interviewed Harold Geyer on two occasions and also spoke with him briefly on a third occasion.

On April 21, 1988, agent Young along with agent Mayeda interviewed Harold Geyer. In response to the question whether he had worked as a machinist for Super K, Geyer stated that he did free lance machining for the last five years, but that his efforts at Super K were that of an expediter. Agent Young testified that when the agents informed Geyer that his $48,500 invoice with overhead and profit added to it was billed to Rockwell at $220,000, Geyer stated that he did not know the invoice cost, overhead, expenses and profit had been sent to Rockwell. The agents told Geyer that they felt he had

submitted a false claim and advised Geyer of the possible charges pending. According to agent Young, Geyer said that he wanted to tell the truth but did not want to be the only one. Geyer then asked if others were going to cooperate and began to cry. Geyer told the agents that he knew what was going on at Super K. Geyer stated that he knew what he was doing was wrong. During the second interview, at the office of Geyer's attorney, Ronald Miller, Geyer confirmed that he did not work on site at Super K.

Agent Young also testified that John Kasparoff informed him that Geyer performed some tooling work and that Geyer worked both on and off site for Super K.

Agent Young also testified that he interviewed petitioner on three occasions and that John Kasparoff was present at all three interviews. Agent Young testified that the agents were seeking background information on the bulkhead contract and were seeking records and time cards. Petitioner did not give agent Young any time cards and no original time cards were ever found.

Agent Young also testified that both Kasparoffs indicated there were no provisions for standby time in the contract and that they did not bill Rockwell for those costs. There was no definition of standby time. Agent Young testified that petitioner informed him that when a part was not at Super K, but instead at Rockwell, Super K was working on other related tooling for the bulkhead and, "standby costs were not an issue."

In his closing argument to the jury, Mr. Hennigan, the Assistant United States Attorney, repeated Harold Geyer's alleged statement that "I know what's going on at Super K. I know I did wrong." Mr. Hennigan further argued that Harold Geyer also stated, "Look, I didn't do

any work on the bulkhead shipset No. 2. I just didn't do anything. This was simply a false invoice."

In his rebuttal argument, Mr. Hennigan again stressed the statements made by Harold Geyer to the agents — "I did no work on shipset 2." Hennigan also restated Geyer's remark to the agents that "I know I did wrong. I know what's going on at Super K. I want to cooperate, but I don't want to be the only one."

The jury reached a unanimous verdict as to Counts I, II and III. The statements attributed to Geyer went solely to these three Counts. The jury was unable to reach a verdict as to Counts IV and V. The government then requested that Counts IV and V be dismissed.

On June 12, 1989, petitioner was sentenced to five years probation, ordered to pay restitution in the amount of $750,000.00 and ordered to perform three thousand hours of community service.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT COMMITTED REVERSIBLE ERROR BY ADMITTING INTO EVIDENCE A NON-TESTIFYING CO-DEFENDANT'S ADMISSIONS, WHICH DIRECTLY INCRIMINATED THE PETITIONER, AND WHICH WERE NOT SUFFICIENTLY REDACTED TO SATISFY THE PRINCIPLES SET FORTH IN *BRUTON* v. *UNITED STATES* AND *RICHARDSON V. MARSH*

In the court below, petitioner argued that the admission of Geyer's statements (a non-testifying co-defendant) constituted *Bruton* error because Super K and petitioner (Joseph Kasparoff) were so closely linked throughout all phases of the trial, that a reference to one was clearly a reference to the other. Accordingly, any

incriminating reference to Super K directly incriminated petitioner.

The Court of Appeals, relying on *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) held that "neither Geyer's general references to Super K nor his specific allusion to 'what was going on at Super K' violated *Bruton* since any reference to the [petitioner], by name or otherwise, had been completely redacted." *United States v. Kasparoff*, United States Court of Appeals for the Ninth Circuit, No. 89-50342 at p.4, *citing Richardson v. Marsh*, *supra*; *United States v. Yarbrough*, 852 F.2d 1522, 1536 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988).

The court found that the references to Super K were only incriminating of petitioner if considered in conjunction with other evidence, such as petitioner's control over Super K or petitioner's alleged involvement in the fraudulent billings. *United States v. Kasparoff*, *supra*, at 4. The court further stressed that "the fact that [petitioner] was closely associated with Super K does not suggest a different result." *Id.*

The rationale relied upon by the court below, while perhaps a technically correct application of the principle set forth in *Richardson v. Marsh*, overlooks the basic premise upon which *Bruton* and its progeny are based.

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that the admission of a co-defendant's post-conspiracy confession implicating the defendant constituted reversible error where the co-defendant did not testify. The Court reasoned that the admission of the co-defendant's statements violated the defendant's Sixth Amendment right to confrontation and cross-examination.

In *Cruz v. New York*, 481 U.S. 186, (1987),[1] this Court reaffirmed *Bruton*, and noted that jury instructions to disregard references to the defendant in a co-defendant's confession are invariably deficient. In *Cruz*, Justice Scalia, writing for the majority, noted that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, (citations) the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant. . . ." *Id.* at 193.

The *Cruz* Court reasoned, as did the Court in *Bruton*, that the risk is too great that a jury faced with a nontestifying co-defendant's admissions in a joint trial will be unable to properly segregate the evidence. *Id.* at 190. Invariably, a jury will not or cannot follow instructions to only apply the admissions in deciding the declarant's guilt or innocence. *Id.*

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court held that the Confrontation Clause is not violated by the admission, at a joint criminal trial, of a non-testifying co-defendant's confession when the co-defendant's confession is redacted *to eliminate any reference to defendant's existence*, and the jury is given a proper limiting instruction. *Id.* at 209. Further, the Court found that in circumstances where the confession of a non-testifying co-defendant incriminates a defendant only through its linkage with other evidence properly before the jury, the right to confrontation is not violated. *Id.* at 211.

In *Richardson v. Marsh*, unlike the instant case, the co-defendant's confession was carefully redacted to avoid *any reference whatsoever* to his co-defendant Marsh. After

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[1]While *Cruz* is factually distinguishable from the instant case, the rationale expressed by the Court is applicable.

Marsh testified in her own behalf, the jury was able to draw inferences from the earlier non-testifying defendant's confession and "link" the statement with Marsh's testimony.

Here, the admission at trial of the statements of Harold Geyer, where Geyer did not testify, directly implicated the defendant. First, the names Super K and Joe Kasparoff were completely interchangeable. The first lines of the indictment read "at all relevant times herein: Super K was a sole proprietorship owned by Joseph Kasparoff . . . Defendant Joseph Kasparoff was the President and sole owner of Super K."

In essence, Super K was the defendant's alter ego. According to the agents, Geyer stated, *inter alia*, that "he got the least of anyone", "that he did not perform the work on Super K property", "that he knew what was going on at Super K" and that he "knew things were not right at Super K". Not only do these statements facially incriminate petitioner, they also directly contradict statements made by petitioner and John Kasparoff. For example, the agents testified that Petitioner and John Kasparoff both stated that Geyer performed work on the Super K premises.

The government, as well as the defense treated petitioner and Super K as one entity throughout the entire trial. Accordingly, the incriminating admissions of Geyer did not require "linkage" to the defendant for their incriminating impact, as was the case in *Richardson v. Marsh*. Instead, in this case, Geyer's admissions *facially incriminated* defendant. Accordingly, *Richardson v. Marsh* does not apply in this case.

Unlike the situation presented in *Richardson v. Marsh*, here, the government introduced, through the same

agents who testified concerning Geyer's admissions, statements by the defendant directly contradicting Geyer's admissions. Essentially, this pitted Geyer's hearsay admissions which alleged misconduct on the part of the defendant, against defendant's hearsay denials.

The right to confrontation, if it is to have any meaning at all, must provide criminal defendants the opportunity to challenge the credibility, reliability and veracity of the prosecution's witnesses in these kinds of situations. *See Bruton, supra; Douglas v. Alabama*, 380 U.S. 415 (1965). In this case, defendant was denied the opportunity to confront Harold Geyer regarding his statements that were devastating to the defense.

Geyer's statements also directly implicated the defendant on another level. The statements of Geyer to the effect that he did no work on the bulkhead and did not perform any work at Super K constituted essential elements in the government's proof to the charges in this case. Super K allegedly submitted a false claim regarding work Geyer was said to have performed. The government also alleged that Super K falsely stated that the work was done "in-house."

Geyer's admissions, in effect, were the only evidence the government introduced to support these allegations. Therefore, in addition to constituting damaging admissions by a non-testifying co-defendant, the hearsay statements by Geyer constituted direct accusations against the defendant crucial to support the government's accusations.

The admission of Geyer's incriminating statements against defendant, without defendant having the opportunity to confront and cross-examine Geyer undermined the basic premise underlying the rights guaranteed by the

Confrontation Clause. Defendant never had the opportunity to test Geyer's abilities of recollection, recall and credibility in an attempt to show that Geyer was mistaken or uncertain as to what projects he had worked on. This denial deprived defendant of a fair trial in contravention of the Sixth Amendment.

Absent the admission of Geyer's statements, it is very likely the jury would have reached a different result. The elimination of defendant's name from certain portions of the statements provided only an illusory cleansing of the statement. The admissions by Geyer essentially constituted a confession of preparing a false claim and submitting the claim to Super K (defendant), who in turn submitted the claim to the government. This was the gravamen of Counts 1, 2 and 3 (involving Shipset 2) of which the defendant was found guilty. By contrast, the jury was unable to reach a verdict on Counts 4 and 5 which dealt with a project that Geyer was not involved.

While the court instructed the jury not to consider Geyer's admissions against the other defendants, their impact, coming from three government agents, describing separate conversations, was devastating evidence of petitioner's involvement in the offenses charged in Counts 1, 2, and 3. Moreover, as this Court has noted repeatedly, a jury cannot properly follow instructions in this context. *See Cruz, supra; Bruton, supra.*

This Court should grant Certiorari to remedy the lower court's clear over extension of the principles set forth in *Richardson v. Marsh* and to clarify what constitutes sufficient redaction to satisfy the well-settled rule enunciated in *Bruton* and its vast progeny. Moreover, the "linkage" doctrine as applied by the lower courts, undermines the principles upon which *Bruton* rests.

The application of the logic exercised by the lower court in this case, could lead to a situation (not unlike the one presented by the facts of the instant case), where a non-testifying co-defendant incriminates a defendant, but instead of using the defendant's actual name, uses a nickname. The prosecution then puts on a witness to testify what the defendant's actual name is. Applying the lower court's reasoning in reliance on *Richardson v. Marsh*, the non-testifying co-defendant's testimony incriminating the defendant would be admissible and not violate the Confrontation Clause because the statement did not facially incriminate the defendant, but did so only after being linked up with other evidence presented at the trial. It is hoped that this was not the result envisioned by this Court when deciding *Richardson v. Marsh*. Accordingly, the Court should grant review to clarify to what extent *Richardson v. Marsh* permits the introduction into evidence of a non-testifying co-defendant's statements that clearly incriminate a co-defendant.

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 30, 1990.

Dated: February 28, 1991.

Respectfully Submitted,

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APPENDIX A

No. 89-50333
No. 89-50342
D.C. No. CR-88-915-FFF

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff Appellee,

vs.

JOHN KASPAROFF and
JOSEPH KASPAROFF,
Defendants-Appellants.

MEMORANDUM*

**Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding**

**Argued and Submitted November 5, 1990
Pasadena, California**

Filed Nov. 30, 1990
Cathy A. Catterson,
Clerk U.S. Court of Appeals

Before NORRIS, HALL and RYMER, Circuit Judges.

John and Joseph Kasparoff appeal their convictions for conspiracy to defraud the government, in violation of 18 U.S.C. § 371, making a false statement on a matter within federal jurisdiction, in violation of 18 U.S.C. § 1001, and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

submitting a false claim to the government, in violation of 18 U.S.C. § 287. We affirm their convictions.

I

The Kasparoffs' sole claim on appeal is that their rights under the Confrontation Clause were violated by the admission at their joint trial of redacted statements made by Harold Geyer, a nontestifying codefendant.

A

The Kasparoffs argue that the admission of Geyer's redacted testimony constituted error under *Bruton v. United States*, 391 U.S. 123 (1968).[1] *Bruton* holds that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) (citing *Bruton*, 391 U.S. at 135-136). We review this question de novo. *United States v. Yarbrough*, 852 F.2d 1522, 1536 (9th Cir.), *cert. denied*, 488 U.S. 866, 109 S.Ct. 171, 102 L.Ed.2d 140 (1988).

The Kasparoffs allege that *Bruton* error occurred in two respects. First, they argue that Super K and the Kasparoffs were so closely linked in the eyes of the jury that any reference to the former was necessarily a reference to the latter, and was therefore "facially incriminating"

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[1]The Kasparoffs also find *Bruton* error in the district court's denial of their motion to sever their trial from Geyer's. We need not reach that issue, however, since the Kasparoff's failure to renew that motion at the close of the prosecution's case-in-chief constitutes a waiver of the issue on appeal. *United States v. Smith*, 893 F.2d 1573, 1581 (9th Cir. 1990).

within the meaning of *Bruton*. Second, John Kasparoff argues that the redaction of Geyer's testimony failed to satisfy *Bruton* since his references to "*other people* [who] were going to cooperate" and "[getting] the least of *anyone* in the whole situation" (emphasis added) implicitly incriminated the Kasparoffs. We disagree with both contentions.

Under the narrowing construction given it in *Marsh*, *Bruton* properly applies only where the nontestifying codefendant's confession " 'expressly implicat[es]' " the defendant or is " 'powerfully incriminating.' " *Id.* at 208 (quoting *Bruton*, 391 U.S. at 124 n.1, and at 135). As we noted in *United States v. Yarbrough*, "*Bruton* does not require that *all* extrajudicial statements or confessions not be used in a joint trial. Rather, only those statements that 'clearly inculpate' the defendant or are 'powerfully incriminating' implicate the 'bruton rule.' " 852 F.2d 1522, 1537 (9th Cir.) (citing *Marsh*, 481 U.S. at 208), *cert. denied*, 488 U.S. 866, 109 S.Ct. 171, 102 L.Ed.2d 140 (1988). In that situation, it is doubtful that "the jury can possibly be expected to forget [the confession] in assessing the defendant's guilt." *Marsh*, 481 U.S. at 208.

Bruton is thus a "narrow exception" to the general rule that jurors follow their instructions. *Id.* at 207. It is inapplicable in cases where the confession is not "incriminating on its face," but becomes "so only when linked with evidence introduced later at trial." *Id.* at 208. In those situations, "it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, [but] there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*[]." *Marsh*, 481 U.S. at 208. Consistent with this view of *Bruton*, the *Marsh* Court went on to hold that "the Confrontation Clause is

not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." *Id.* at 211 (footnote omitted).

We hold that neither Geyer's general references to Super K nor his specific allusion to "what was going on at Super K" violated *Bruton* since any reference to the Kasparoffs, by name or otherwise, had been completely redacted; the Kasparoffs were therefore never "expressly implicate[d]. *See Marsh*, 481 U.S. at 211; *Yarbrough*, 852 F.2d at 1537 (statement totally redacted to prevent reference to codefendants does not violate *Bruton*). The fact that the Kasparoffs were closely associated with Super K does not suggest a different result. References to Super K could only incriminate them if the jury considered evidence other than that contained in the statement themselves, such as the Kasparoffs' control over Super K or their alleged involvement in the fraudulent billings. *Marsh* makes clear that this is an insufficient basis for a *Bruton* violation. 481 U.S. at 208; *see also United States v. Sherlock*, 865 F.2d 1069, 1080 (9th Cir. 1989) (no *Bruton* error where statement does not implicate defendant unless linked with other evidence introduced at trial). Any risk of *Bruton* error was further minimized by the thorough and repeated admonitions the district judge gave the jury, instructing them that the statements could be used only against Geyer. *See Marsh*, 481 U.S. at 211; *Yarbrough*, 852 F.2d at 1537 (instructions to jury support finding of no *Bruton* error).

We also reject John Kasparoff's argument that Geyer's references to "anyone," and "other people" violated *Bruton* since they are "symbol[s] or neutral pronouns" that implicated the Kasparoffs. First, neither of these

terms, in the context in which they were used, were substituted for the Kasparoffs. Second, even if they had been, they were not "facially incriminating," and thus did not run afoul of *Bruton*. *See Marsh*, 481 U.S. at 208; *United States v. Vasquez*, 874 F.2d 1515, 1518 (11th Cir. 1989) ("[T]he admission in a joint trial of a codefendant's confession that is redacted to substitute a neutral pronoun or other general word for the name of the complaining defendant does not violate *Bruton* so long as the confession does not compel a direct implication of the complaining defendant.") (footnote omitted), *cert. denied*, 110 S.Ct. 845, 107 L.Ed.2d 840 (1990).[2]

B

As a second basis for his Confrontation Clause claim, Joseph Kasparoff alleges that Geyer's statements do not meet the criteria for admission of a coconspirator's hearsay statement set forth in *Dutton v. Evans*, 400 U.S. 74 (1970). *Dutton* and its progeny, however, address the use of hearsay declarations *against* another codefendant or coconspirator. Since the government in this case offered Geyer's statements against Geyer alone, and the jury was

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[2]The Sixth and Eleventh Circuit cases relied upon by John Kasparoff do not suggest a different result. *United States v. Pickett*, 746 F.2d 1129 (6th Cir. 1984), and *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978) are pre-*Marsh* cases which, contrary to *Marsh*, considered the incriminatory effect of a redacted statement in light of "the circumstances of the case and other evidence admitted." *Hodges*, 570 F.2d at 647. Those cases and two others he cites, *United States v. Petit*, 841 F.2d 1546 (11th Cir. 1988), and *United States v. Bennett*, 848 F.2d 1134 (11th Cir. 1988), may also be distinguished on their facts. The redacted statements in those cases all referred to specific, discrete acts by codefendants which, even after the redaction, were arguably facially incriminating. Here, by comparison, Geyer's references were vague, general, and nonincriminating.

instructed to use them only for that purpose, *Dutton* is inapplicable.

C

John Kasparoff argues that the district court abused its discretion in denying his *in limine* motion to exclude the Geyer statements and a motion for a new trial based upon those admissions. In the absence of a *Bruton* error, both motions were meritless and were properly denied by the trial court.

II

The Kasparoffs' convictions are AFFIRMED.